No. 92-603

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

BEACH COMMUNICATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The Cable Communications Policy Act of 1984 exempts from coverage facilities that serve "only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities use[] any public right-of-way." 47 U.S.C. 522(6) (1988). The question presented is whether the resulting regulatory distinction between facilities serving separately rather than commonly owned, controlled, or managed buildings is rationally related to a legitimate government purpose under the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioners, respondents below, are the United States and the Federal Communications Commission. Respondents, petitioners below, are Beach Communications, Inc., Maxtel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc. Respondents, intervenors below, are Spectradyne, Inc., National Cable Television Association, Inc., Wireless Cable Association, Inc., Southwestern Bell Corporation, and Hughes Communications Galaxy, Inc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 965 F.2d 1103. A previous opinion of the court of appeals in this case (Pet. App. 8a-45a) is reported at 959 F.2d 975.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1992. On September 1, 1992, the Chief Justice extended the time for filing a petition to and including October 7, 1992. The petition for a writ of certiorari was filed on October 7, 1992, and was granted on November 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 602(6) of the Communications Act of 1934, as amended, 47 U.S.C. 522(6) (1988),[1] provides:

> [T]he term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include * * * (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way * * * [.]

STATEMENT

A traditional cable system "receives signals at a remote location and transmits them throughout a community via a network of wires that use local rights-of-way." Pet. App. 11a; see *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804, 806 (D.C. Cir. 1984). A Satellite Master Antenna Television (SMATV) system, in contrast, is typically a smaller system that receives signals via satellite and retransmits them by wire from a satellite antenna atop a multiple-unit building to units within the building or building complex. See Pet. App. 11a; see also *In re Definition of a Cable Television Sys.*, 5 F.C.C. Rcd. 7638, 7639 (1990) (describing SMATV systems); J.A. 12.

This case involves a challenge by SMATV companies to Congress's imposition of a franchising requirement upon cable facilities that physically interconnect separately owned, controlled, and managed buildings without using public rights-of-way. Under the plain language of 47 U.S.C. 522(6) (1988), such facilities are "cable systems" subject to the franchising requirements of 47 U.S.C. 541(b)(1) (1988). Similar facilities that serve commonly owned, controlled, or managed buildings, however, are entitled to the so-called "private cable" exemption under Section 522(6)(B). The question presented in this case is whether the statutory distinction between common and separate ownership, control, and management is supported by a rational basis under the equal protection component of the Due Process Clause of the Fifth Amendment.

1. a. The Cable Communications Policy Act of 1984 (Cable Act), Pub. L. No. 98-549, 98 Stat. 2779, was enacted, *inter alia*, to establish "a national policy" for cable communications and to provide for "franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs

[1] Since the decision of the court of appeals in this case, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, which, *inter alia*, renumbered subsection (6) of 47 U.S.C. 522 as subsection (7). For convenience, we refer to the version of the statute in effect when the court of appeals issued its decision in this case.

and interests of the local community." 47 U.S.C. 521 (1) and (2) (1988). To effectuate the purposes of the Act, Congress provided that "a cable operator" may not supply "cable service without a franchise." 47 U.S.C. 541(b)(1) (1988).[2] A "cable operator" is a person who provides service through "a cable system" (47 U.S.C. 522(4) (1988)), which is defined as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. 522(6) (1988). The definition of "cable system," however, contains a "private cable" exemption for any "facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities use[] any public right-of-way." 47 U.S.C. 522(6)(B) (1988).

b. This action arises out of a Federal Communications Commission proceeding interpreting the term "cable system" as applied to SMATV facilities. The Cable Act's definition of "cable system" is substantially similar to the FCC's pre-Cable Act[3] regulatory

[2] The franchising requirement of 47 U.S.C. 541(b) (1988) provides an exception for cable operators "lawfully providing cable service without a franchise on June 1, 1984." 47 U.S.C. 541(b)(2) (1988). The recent legislation amended 47 U.S.C. 541(b) to provide a second exception for municipal authorities that are, or are affiliated with, franchise authorities and that act as multichannel video programming distributors. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 7, 106 Stat. 1483-1484.

[3] Prior to 1984, the Commission had since 1965 regulated cable communications pursuant to authority under the Communications Act of 1934. See *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 697 (1965); see also *Malrite T.V.* v. *FCC*, 652 F.2d 1140, 1143-1147 (2d Cir. 1981) (describing subsequent developments in cable regulation), cert. denied, 454 U.S. 1143 (1982). In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), the Court sustained the Commission's authority to promulgate cable regulations "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting."

definition of "cable television system." Compare 47 U.S.C. 522(6) (1988) with 47 C.F.R. 76.5(a) (1984).[4] Of relevance here, the Act incorporated the regulatory "private cable" exemption, but added the proviso denying exemption to facilities that "use[] any public right-of-way." 47 U.S.C. 522(6)(B)

[4] When the Cable Act was enacted in 1984, the pertinent Commission regulation defined "cable television system" as follows:

> A nonbroadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcast stations, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management.

47 C.F.R. 76.5(a) (1984). The so-called "private cable" exemption in Section 76.5(a)(2) traces back to the Commission's first set of cable rules in 1965. See *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. at 741 (exempting "any * * * facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house").

(1988).[5] In light of that new proviso, the Commission at first interpreted Section 522(6)(B) to mean that "[w]hen multiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not * * * ownership, control or management." *In re Amendments of Parts 1, 63, & 76*, 104 F.C.C.2d 386, 396-397 (1986); see *Report & Order in MM Docket No. 84-1296*, 58 Rad. Reg. 2d (P & F) 1, 11 (1985) ("With regard to the exclusion of facilities serving multiple unit dwellings, we will include as cable systems only such facilities that use public rights-of-way.").

Subsequently, however, the Commission issued the report and order at issue here, which revised and clarified its interpretation of the term "cable system" under the Act. See *In re Definition of a Cable Television Sys.*, 5 F.C.C. Rcd. 7638 (1990); J.A. 5-31. First, observing that Section 522(6) requires the use of "closed transmission paths," the FCC found that the term "cable system" does not include any facility that uses nonphysical transmission media (such as radio waves) to send signals to multiple-unit

[5] The 1984 Cable Act also changed the definition of cable system in several respects not material to the question under review. For example, the former regulatory definition of a cable television system referred to the distribution of "the signals of one or more television broadcast stations" (47 C.F.R. 76.5(a) (1984)), whereas the Cable Act refers to the provision of "cable service which includes video programming" (47 U.S.C. 522(6) (1988)). See *Report & Order in MM Docket No. 84-1296*, 58 Rad. Reg. 2d (P & F) 1, 9 (1985). The statute also eiminated the regulatory exemption for cable systems with 50 or fewer subscribers. *Ibid.*

buildings. 5 F.C.C. Rcd. at 7638-7639; J.A. 8-11.[6] Second, the Commission determined that facilities serving only a single multiple-unit building by wire are not "cable systems." 5 F.C.C. Rcd. at 7640-7641; J.A. 13-20.[7] Third, reversing its prior order interpreting the Act's "private cable" exemption, the Commission concluded that the exemption is available for physically interconnected multiple-unit buildings only if the buildings satisfy the "common ownership"[8]

[6] Facilities using nonphysical transmission media include multipoint distribution systems (MDS), which beam microwaves to building antennae and then distribute them by wire from each antenna to units within a particular building. *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d at 806. Direct broadcast satellites (DBS) transmit signals from powerful satellites directly to receivers on individual homes. *Ibid.* The Commission concluded that MDS and DBS services do not meet the Cable Act's definition of "cable system." See 5 F.C.C. Rcd. at 7638-7639; J.A. 8-11. That determination, in the Commission's view, was buttressed by its pre-Cable Act treatment of such services as being outside the definition of a cable system. 5 F.C.C. Rcd. at 7839; J.A. 10-11.

[7] Noting the "virtually identical" (5 F.C.C. Rcd. at 7640; J.A. 13) wording of 47 U.S.C. 522(6) and the pre-Cable Act rule, the Commission rested its determination on its own pre-Cable Act precedents establishing that "the use of wire or cable within the confines of a multi-unit building is not sufficient to bring the service within the jurisdictional bounds of a 'cable' system." 5 F.C.C. Rcd. at 7640; J.A. 15.

[8] For purposes of simplicity, we refer to the requirement of "common ownership, control, or management" as the "common ownership" requirement. We also use the terms "commonly owned" or "separately owned" to refer to ownership, control, and management.

requirement. 5 F.C.C. Rcd. at 7641-7642; J.A. 20-25.[9]

Thus, as the FCC interprets the statute, a SMATV operator who does not use public rights-of-way is subject to the Act if he connects separately owned multiple-unit dwellings by physical means, but not if he connects commonly owned multiple-unit dwellings by physical means. In addition, an otherwise covered SMATV operator who uses nonphysical means to transmit service is not covered, while one who uses physical means is.

2. a. Respondents [10] challenged the FCC's interpretation of the Cable Act on statutory and constitutional grounds. The court of appeals first rejected respondents' contention that the Cable Act does not cover SMATV facilities that physically connect separately owned, controlled, and managed buildings without crossing public rights-of-way. The court reasoned that, under the plain language of 47 U.S.C. 522(6) (1988), such facilities satisfy all of the criteria for coverage.[11] The court also found the facilities inel-

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[9] In that regard, the Commission noted that a contrary interpretation would not only "render the 'common ownership, control, or management' portion of the statutory definition superfluous," but also eliminate an "aspect of the ['private cable'] exception [that] has been a part of our definition of a cable system from the beginning." 5 F.C.C. Rcd. at 7641; J.A. 21-22.

[10] We use the term "respondents" to refer to respondents Beach Communications, Inc., Maxtel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc.

[11] Respondents conceded that their facilities use "closed transmission paths" and associated equipment, and that they supply "video programming." Pet. App. 20a. The court was unpersuaded by their contention that SMATV facilities do not serve "multiple subscribers within a community" (47 U.S.C. 522(6) (1988)) because service is limited to a particular group of buildings within a community. Pet. App. 20a.

ligible for the "private cable" exemption under Section 522 (6) (B), which in plain terms requires "common ownership, control, or management" of the buildings served. Pet. App. 20a-21a.

The court, however, found merit in respondents' claim that Section 522(6) violates the Fifth Amendment because there is no rational basis for imposing franchise requirements upon the covered SMATV facilities, while exempting (a) SMATV facilities that satisfy the "common ownership" requirement and use no public rights-of-way, and (b) distribution systems using nonphysical media to transmit signals to multiple-unit dwellings.[12] The court agreed with

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[12] Respondents also claimed that applying a franchising requirement to their cable operations violated the First Amendment. The court, however, found that claim unripe. Pet. App. 25a-31a. The court acknowledged that 47 U.S.C. 541(b)(1) (1988) imposed a franchising requirement upon the SMATV operators, but noted that the Cable Act gave localities "broad discretion to determine the substance and process of franchising"—including the authority to adopt "a summary process." Pet. App. 25a-27a. Because of the local discretion over particular franchising duties, and "because the justification for [those] dut[ies] [would] depend on local facts," the court concluded that a pre-enforcement, facial attack upon Section 522(6) under the First Amendment was unfit for present judicial determination. Pet. App. 27a. Finally, because it was unclear whether particular franchising systems would impose any substantial compliance costs, and because respondents could file anticipatory as-applied challenges, the court concluded that the availability of criminal and civil penalties for noncompliance with the

respondents that no rational basis was evident "[o]n the record before [it]." Pet. App. 34a. Finding that the traditional rationale for cable franchising—the use of public rights-of-way—did not apply to the pertinent types of facilities, the court was unable to discern any alternative ground for distinction in the legislative record or "to imagine *any* basis" itself. *Id.* at 34a-35a. The court remanded the case to the FCC to create an administrative record of "legislative facts" suggesting a "conceivable basis" for the distinction. *Id.* at 36a.[13]

b. Chief Judge Mikva concurred in part and concurred in the judgment, but did not join the court's equal protection analysis. Pet. App. 36a-45a. Observ-

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Act did not amount to hardship requiring immediate judicial review. Pet. App. 30a-31a.

We note that the Cable Television Consumer Protection and Competition Act of 1992 has now substantially revised the obligations imposed upon cable systems under the Communications Act. For example, the new statute includes more detailed provisions concerning cable rate regulation (§ 3, 106 Stat. 1464-1471) and adds new signal carriage requirements (§§ 4-5, 106 Stat. 1471-1481). The new regulatory provisions, however, are not before this Court. In addition, the 1992 legislation does not affect the definition of "cable system" or, accordingly, the question whether there is a rational basis for distinguishing between facilities serving commonly and separately owned multiple-unit buildings.

[13] Respondents also contended that the court should apply heightened scrutiny under the equal protection component of the Due Process Clause, because the classification at issue infringed fundamental First Amendment rights. Pet. App. 31a. The court noted that if the Commission provided a rational basis for the classification, the court would have to decide whether a "fundamental rights" equal protection claim was ripe. *Id.* at 32a.

ing that the Cable Act bears a "very strong presumption of constitutionality" that may be sustained "by justifications in or out of the record," he found the challenged distinctions "entirely reasonable in light of the * * * Act's purposes." *Id.* at 40a-41a. With respect to the Act's distinction between facilities interconnecting buildings by wire, rather than nonphysical transmission media, Chief Judge Mikva suggested that the classification serves Congress's objective of promoting new technologies, by "creat[ing] an incentive for SMATV operators to switch from physical wiring to radio transmission so that they are exempt from regulation." *Id.* at 42a. As for the "common ownership" requirement in 47 U.S.C. 522(6)(B) (1988), the concurrence noted that Congress could have reasoned that a SMATV system "serving multiple buildings not under common ownership is similar to a traditional cable system," but that one "serving buildings under common ownership is likely to be smaller, and the ability of residents to influence ownership [is] likely to be greater." Pet. App. 43a. Chief Judge Mikva, however, concurred in the remand to allow the FCC "to put the classifications in context." *Id.* at 44a.

3. a. The FCC's report to the court of appeals endorsed the reasoning of the concurrence without offering additional supporting facts. See Pet. App. 50a. After receiving the report, a divided court of appeals held the Cable Act unconstitutional, finding no rational basis for the "common ownership" requirement. *Id.* at 3a-4a.[14] While acknowledging that Chief

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[14] Although it had adverted to the issue in its initial decision, the majority did not address whether there was a

Judge Mikva had suggested justifications for the requirement in his prior opinion, the court reasoned that it had "no basis for assuming" the state of facts that he had posited and found it dispositive that "the FCC has wholly failed to flesh th[ose] [justifications] out, or to suggest some alternative rationale." *Id.* at 4a. The court accordingly held that SMATV systems serving customers in buildings under separate ownership, control, and management, were to be exempted from the Act's franchise requirements if they did not use public rights-of-way. *Id.* at 5a-6a.

b. Chief Judge Mikva dissented for the reasons advanced in his prior concurring opinion. Pet. App. 7a.

SUMMARY OF ARGUMENT

A divided panel of the court of appeals invalidated an Act of Congress regulating cable communications on the ground that the Act's classification of cable facilities lacks any conceivable rational basis. The court thereby repudiated Congress's judgment that the rationale for regulating cable facilities is likely to be absent when a cable facility only serves multiple-unit dwellings under common ownership, control, or management. In so doing, the majority ignored the plausible assumption (see Pet. App. 43a (separate opinion of Mikva, C.J.)) that the "common ownership" requirement serves the interest of consumer welfare by placing a relative constraint on the size of a cable facility's subscriber base, and that it is a rational rule-of-thumb for determining when the cost of regulating facilities outweighs the benefits of doing

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rational basis for distinguishing facilities using physical transmission media from those using nonphysical media, such as radio waves. Pet. App. 3a.

so. The court also disregarded Commission precedent, which had embraced a "private cable" exemption, and the accompanying "common ownership" requirement, from the inception of the FCC's regulation of cable. See, *e.g.*, *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 741 (1965).

The court's rejection of Congress's policy judgment, and of the plausible assumptions supporting it, was premised on basic errors in the application of rationality review under the equal protection component of Due Process Clause of the Fifth Amendment. The court remanded the case to the Commission because the majority could not conceive of a rational basis "[o]n the record before [it]." Pet. App. 34a. The majority also refused to credit plausible assumptions suggested by Chief Judge Mikva and endorsed by the FCC, because the majority had "no basis for assuming" them and because the Commission, on remand, had failed to "flesh the[m] out." *Id.* at 4a.

Accordingly, the majority effectively held that a factual basis for a classification in an Act of Congress must appear on a legislative or administrative record. That is contrary to settled principles of rational-basis review, see, *e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478 (1990); *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166 (1980); *Vance* v. *Bradley*, 440 U.S. 93 (1979). The court of appeals' decision conflicts with a number of decisions of this Court that apply the rational-basis test by indulging plausible, but unverified, assumptions that are without evidentiary support in the record. See, *e.g.*, *United States R.R. Retirement Bd.* v. *Fritz*, *supra*; *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949).

The court of appeals' failure to adhere to this Court's precedents caused it to invalidate a complex, thoroughly considered piece of socio-economic legislation, even though the suggested justifications fall well within the reach of "rough accommodations" (*Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)) that the democratic process is entitled to make under the rational-basis test. Although Congress could assuredly have chosen a more precise method of exempting smaller facilities from regulation, the classification here is not unconstitutional merely because it is "imperfect" or is not drawn with "mathematical nicety." *Ibid.*; see *City of Dallas* v. *Stanglin*, 490 U.S. 19, 27 (1989). In fact, the "common ownership" requirement is not so overinclusive and underinclusive that it bears no rational relationship to "any combination of legitimate purposes"; hence, it easily passes muster under equal protection principles. See *Vance* v. *Bradley*, 440 U.S. at 97.

Finally, the court's error stems, in part, from its undue emphasis on *one* traditional justification for cable franchising—a facility's use of public rights-of-way. Pet. App. 34a-35a. This Court long ago abandoned the notion that a legislature's authority to regulate business exists only where the business is somehow "affected with a public interest." See *Nebbia* v. *New York*, 291 U.S. 502, 536 (1934). By suggesting that the use of public rights-of-way is the only conceivable basis for distinguishing between facilities that may be subject to local franchising and those that may not, the court of appeals gave far too much weight to its own views of wise public policy, and far too little weight to the presumption of validity that attaches to Acts of Congress under the rational-basis test. See *Lyng* v. *International Union*,

UAW, 485 U.S. 360, 370 (1988); *Hodel* v. *Indiana*, 452 U.S. 314, 331-332 (1981).

ARGUMENT

I. IN APPLYING THE RATIONAL-BASIS TEST UNDER THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE, FEDERAL COURTS MUST UPHOLD A LEGISLATIVE CLASSIFICATION IF ANY FACTS REASONABLY MAY BE CONCEIVED TO SUPPORT THE CLASSIFICATION

A. Socio-Economic Legislation Must Be Sustained If Facts Reasonably May Be Conceived To Support It

"There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy." *Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963). That judicial assault on democratic institutions, however, ended long ago, when the Court returned "to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.* at 730. "Differences of opinion" about "the wisdom, need, or appropriateness" of legislation are now thought to "suggest a choice which should be left where * * * it was left by the Constitution—to the States and to Congress." *Olsen* v. *Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236, 246 (1941); accord, *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 425 (1952). And this Court's contemporary decisions proceed from the premise that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy deter-

minations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976); see, *e.g.*, *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165 (1973); *Ferguson* v. *Skrupa*, 372 U.S. at 731-732. Because federal courts lack the "authority and competence" to assume "a legislative role" (*San Antonio Indep. School Dist.* v. *Rodriguez*, 411 U.S. 1, 31 (1973)), a federal court passing on the wisdom of an Act of Congress "exceed[s] its proper role" under the Constitution. *Hodel* v. *Indiana*, 452 U.S. 314, 333 (1981).

This philosophy of judicial self-restraint supplies the framework for evaluating socio-economic legislation, such as the Cable Act, under the equal protection component of the Due Process Clause of the Fifth Amendment. See, *e.g.*, *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 175-176 (1980); *Vance* v. *Bradley*, 440 U.S. 93, 102 (1979); *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960). Under the "rational basis" test applicable to such legislation, this Court has held that "[w]here * * * there are plausible reasons for Congress' action, [judicial] inquiry is at an end." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179. Accordingly, if "any state of facts reasonably may be conceived" to justify a "statutory distinction," the statute complies with equal protection principles, and Congress's policy determination must prevail. *Sullivan* v. *Stroop*, 496 U.S. at 485; accord, *Bowen* v. *Gilliard*, 483 U.S. 587, 601 (1987); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). Properly applied, the rational-basis test therefore ensures that federal courts have

"no power to impose * * * their views of what constitutes wise economic or social policy." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 175.

B. The Validity Of A Legislative Classification Under The Rational-Basis Test Does Not Require Evidence Of Supporting Facts To Be Placed On A Legislative Or Judicial Record

This Court has made clear that Congress has no duty under the Constitution to create a legislative record of the facts supporting its legislation. Indeed, far from imposing an "on-the-record" requirement, this Court has emphasized that if a rational basis for a statute can reasonably be conceived, "[i]t is * * * 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179 (citation omitted); accord, *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 528 (1959); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 511 (1937); see also *Munn* v. *Illinois*, 94 U.S. 113, 132-133 (1877) ("[W]e must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed.").

A corollary of that principle is that when socio-economic legislation is attacked on equal protection grounds, the government does not have a burden of producing evidence to sustain the rationality of Congress's classification. First, socio-economic legislation is accorded a strong presumption of validity under the rational-basis test. See, *e.g.*, *Lyng* v. *In-*

ternational Union, UAW, 485 U.S. 360, 370 (1988). In fact, "such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel* v. *Indiana*, 452 U.S. at 331-332; see *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) ("The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.") Second, nothing in Article I of the Constitution, the Due Process Clause, or this Court's cases suggests that Congress may formulate policy only if its factual premises are provable by a preponderance of the evidence in a court of law. Rather, as this Court has made plain, a court's "responsibility for making 'findings of fact' * * * does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than * * * 'pure speculation.'" *Vance* v. *Bradley*, 440 U.S. at 111. In other words, Congress is authorized to speculate when addressing regulatory problems, and the rational-basis test—properly applied—ensures that the judiciary will not unduly circumscribe such efforts.[15]

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[15] In *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 (1938), the Court rejected a Fifth Amendment challenge to a statute prohibiting the interstate shipment of skimmed milk enhanced by fat other than milk fat. In so doing, the Court offered the following pertinent summary of the rational-basis test:

> [B]y their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

II. THE COURT OF APPEALS IMPERMISSIBLY REQUIRED THE CREATION OF AN ADMINISTRATIVE RECORD TO SUPPORT THE RATIONALITY OF 47 U.S.C. 522(6) (1988) AND ERRONEOUSLY HELD THAT THE STATUTE WAS UNSUPPORTED BY A RATIONAL BASIS

In holding unconstitutional the Cable Act's definition of "cable system" on the ground that its distinction between cable facilities serving separately rather than commonly owned buildings lacked a rational basis, the court of appeals made three related errors. First, the Court rejected the plausible assumptions about the effect of the "common ownership" requirement on consumer welfare, even though those assumptions easily satisfy the standard of rationality articulated in this Court's decisions. Second, the court did so because the Federal Communications Commission did not create an administrative record to support the classification. Third, the Court attached undue significance to the Commission's pre-Cable Act reliance on public rights-of-way as a rationale for franchising requirements.

A. The Court Of Appeals Erred In Rejecting The "Consumer Welfare" Rationale For The "Common Ownership" Requirement

Contrary to the court of appeals' decision, the "private cable" exemption in 47 U.S.C. 522(6)(B)

(1988) is rational. Reasonable assumptions about the practical effect of a "common ownership" requirement upon consumer welfare are sufficient to sustain the classification at issue. Common sense suggests that in contrast to cable facilities that serve separately owned units, a requirement of common ownership, control, or management imposes a relative constraint upon the size of the market being served by the relevant SMATV facilities. That constraint on size, in turn, provides each consumer of cable services greater leverage over the product supplied. A subscriber's leverage, moreover, is likely to be enhanced by the fact that all of the consumers will be able to use their status as unit owners or tenants to bring common pressure to bear on a single set of owners or managers who provide or purchase all of a facility's service. Accordingly, "Congress could have reasoned * * * that a SMATV facility serving buildings under common ownership is likely to be smaller, and the ability of residents to influence ownership likely to be greater, so that the costs of regulation could outweigh the benefits." Pet. App. 43a (separate opinion of Mikva, C.J.).

Indeed, the reasonable supposition underlying the "consumer welfare" rationale—that cable facilities serving commonly owned buildings are more likely to be less in need of regulation—finds support in the FCC's consistent pre-Cable Act policy of exempting facilities from regulation on that basis. The "private cable" exemption originated in the Commission's first cable regulations, which exempted from coverage "any * * * facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an

apartment house." *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 741 (1965).[16] Although the FCC's regulations changed in a number of respects over time, see generally *Malrite T.V.* v. *FCC*, 652 F.2d 1140, 1143-1147 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982), the Commission retained the essentials of the "private cable" exemption throughout its revisions of the cable rules. See, *e.g.*, *Second Report & Order in Docket Nos. 14895, 15233, & 15971*, 2 F.C.C.2d 725, 797, 799, 801 (1966); *Cable Television Report & Order*, 36 F.C.C.2d 143, 214 (1972); *First Report & Order in Docket No. 20561*, 63 F.C.C.2d 956, 990-997 (1977); *Memorandum Opinion & Order in Docket No. 20561*, 67 F.C.C.2d 716, 725-726 (1978).[17]

Although the Commission's early cable rulemaking proceedings offered little insight into the reasons underlying the "private cable" exemption, the FCC later elaborated on the rationale for that exemption. Referring to the "private cable" exemption and the

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[16] Facilities with fewer than 50 subscribers were also exempt from coverage under those regulations. 38 F.C.C.2d at 741.

[17] That exemption was originally designed to exclude from regulation Master Antenna Television (MATV) systems, which receive normal broadcast signals through rooftop antennae and retransmit them by wire to multiple units within a single building or a commonly owned, controlled, or managed building complex. See Pet. App. 12a. As technology developed and SMATV systems came into being, the Commission made clear that the "private cable" exemption would apply to those systems as well. See *In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1224 n.3 (1983), aff'd *sub nom. New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984).

(subsequently repealed) exemption for facilities that serve fewer than 50 subscribers, the Commission explained:

> [N]ot all [distribution systems] can be subject to effective regulation with the resources available nor is regulation necessarily needed in every instance. A sensible regulatory program requires that a division between the regulated and unregulated be made in a manner which best conserves regulatory energies and allows the most cost effective use of available resources. In attempting to make this division, *we have focused on subscriber numbers as well as the multiple unit dwelling indicia on the theory that the very small are inefficient to regulate and can be safely ignored in terms of their potential for impact on broadcast service to the public and on multiple unit dwelling facilities on the theory that this effectively establishes certain maximum size limitations.*

Memorandum Opinion & Order in Docket No. 20561, 67 F.C.C.2d 716, 726 (1978) (emphasis added); see *First Report & Order in Docket No. 20561*, 63 F.C.C.2d 956, 996 (1977).[18]

[18] In that docket, the Commission considered and rejected proposals to abandon the "private cable exemption" in favor of parity of treatment for MATV and traditional cable systems. See *First Report & Order in Docket No. 20561*, 63 F.C.C.2d at 996; *Memorandum Opinion & Order in Docket No. 20561*, 67 F.C.C.2d at 726. In addition to the limited size of a facility serving commonly owned units, the FCC noted that MATV systems typically pick up only off-the-air broadcast signals, and not distant signals, which makes those facilities less significant competitors in the video programming market. 63 F.C.C.2d at 996. The Commission therefore retained the regulatory distinction between MATV and traditional cable systems, including the "common ownership" requirement.

Although a statute's rationality certainly does not have to be reflected in pre-existing agency precedent,[19] the FCC's reasoning—after more than a dozen years of regulating cable—lends support to the plausible supposition that the "common ownership" requirement is a rational rule-of-thumb for determining when as a general matter the cost of regulating cable facilities will outweigh the benefits.[20] With a "common ownership" requirement, not only will each subscriber have more influence over a smaller facility, but Congress could reasonably have determined that the administrative costs associated with a franchise requirement would place an undesirable burden upon the typically smaller entities at issue. Cf. *United States* v. *Sperry Corp.*, 493 U.S. 52, 65

[19] On the other hand, the fact that a "common ownership" requirement has long been reflected in the Commission's regulations itself supports the rationality of Congress's decision to perpetuate that classification in the Cable Act. By continuing a longstanding regulatory policy, Congress's decision to retain the "common ownership" requirement rationally served the legitimate governmental interest of preserving the existing expectations of those in the cable industry. Cf. *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, 465 (1988); *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2333 (1992).

[20] Respondents suggest (Resp. Supp. Br. 8-10) that Commission precedents involving MATV have no relevance to SMATV. That contention is wrong. To be sure, SMATV differs from MATV in that SMATV is capable of receiving distant signals. But there is no reason that the more pertinent consideration—the likely size of a subscriber base drawn only from those units under common ownership—should differ for SMATV and MATV systems.

(1989) ("Congress could * * * have determined that assessing a user fee against all claimants would undesirably deter those whose claims were small or uncertain of success from presenting them to the [Iran-United States Claims] Tribunal.").[21]

It is true, as respondents contend (Br. in Opp. 14), that Congress could have simply provided that the term "cable system" shall not include any facility serving fewer than a specified number of subscribers. Under the rational-basis test, however, whether respondents "think Congress was unwise in not

[21] Respondents find it "inconceivable" (Resp. Supp. Br. 8) that Congress could have intended to relieve smaller facilities from regulation by enacting 47 U.S.C. 522(6)(B) (1988). That is the appropriate standard, but respondents are wrong. Because a facility's use of wire *within* a multi-unit building is insufficient to trigger the definition of "cable system" (5 F.C.C. Rcd. at 7640-7641; J.A. 13-20), respondents argue (Br. in Opp. 13) that an unfranchised SMATV operator may serve a limitless number of separately owned buildings by placing satellite dishes on each. However, as respondents also note (Br. in Opp. 13), doing so "escalate[s] the cost of serving separately-owned buildings, from the minor cost of a length of interconnecting cable strand to the major cost of [installing] an entire duplicative satellite headend facility" on each building. Thus, withholding exemption from facilities that serve separately owned buildings advances consumer welfare, by making it more costly for a SMATV operator to serve a large market of separately owned buildings without triggering the Cable Act's franchise requirements. In contrast, Congress could reasonably have concluded that such incentives triggering coverage were less warranted for cable facilities serving commonly owned buildings; under a "common ownership" requirement, a facility's franchise obligations will arise whenever it expands to serve subscribers whose dwellings are not under the same ownership, control, or management.

choosing a means more precisely related to its primary purpose is irrelevant." *Vance* v. *Bradley*, 440 U.S. at 109. It is a central assumption of the rational-basis test that "[t]he problems of government are practical ones and may justify * * * rough accommodations." *Dandridge* v. *Williams*, 397 U.S. at 485; see, *e.g.*, *City of Dallas* v. *Stanglin*, 490 U.S. at 27; *Vance* v. *Bradley*, 440 U.S. at 108 n.26. And this Court has repeatedly held that "rational distinctions may be made with substantially less than mathematical exactitude." *Burlington N. R.R.* v. *Ford*, 112 S. Ct. 2184, 2187 (1992); see, *e.g.*, *City of New Orleans* v. *Dukes*, 427 U.S. at 303; *Dandridge* v. *Williams*, 397 U.S. at 485; see also, *e.g.*, *Vance* v. *Bradley*, 440 U.S. at 108 (statute may satisfy rationality review even if it is "to some extent both underinclusive and overinclusive"). The constitutionality of the Cable Act, therefore, turns not on whether the pertinent classification could have been drawn more precisely, but on whether it is plausible to assume that, in general, facilities serving commonly owned units are more likely to serve smaller groups of subscribers. Because that assumption is consistent with common sense (as well as Commission precedent), it cannot be said that "the varying treatment" of facilities serving commonly, as opposed to separately, owned buildings is "so unrelated to * * * any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. at 97.

B. The Court Of Appeals Erred In Rejecting Plausible Reasons For The Classification In 47 U.S.C. 522(6) (1988) On The Ground That There Was No Evidence To Substantiate Them

Based on this Court's precedents, see pp. 17-19, *supra*, the constitutionality of the Cable Act "can be sustained by justifications in or out of the record." Pet. App. 40a (separate opinion of Mikva, C.J.). The court of appeals, however, did not follow that principle in this case, but invalidated an Act of Congress because of the absence of administrative findings to support the plausible justifications advanced in support of the Act.

To be sure, the court of appeals' decision remanding the case to the Commission purported to "assume" that a "conceivable basis," rather than an "articulated basis," would be sufficient to sustain the Cable Act's rationality. Pet. App. 35a. The majority's assertion, however, cannot be squared with its own observation that "[*o*]*n the record before us*, we fail to see a 'rational basis'" for the classification. *Id.* at 34a (emphasis added). It is also difficult to square the court's asserted fidelity to this Court's precedents with its decision to remand the case to secure "additional 'legislative facts'" from the FCC. *Id.* at 36a.

Respondents maintain (Br. in Opp. 23) that the court of appeals was not improperly asking the Commission to create an administrative record to support the classification in 47 U.S.C. 522(6) (1988), but was merely seeking its help in conceiving of legislative facts that might support it. The record, however, does not sustain that contention. In his separate opinion concurring in the remand, Chief Judge Mikva offered plausible justifications for the statu-

tory classifications at issue. Pet. App. 41a-43a. And the Commission agreed with his analysis on remand. *Id.* at 50a.[22] Yet, when the case was returned to the court after the remand, the court did not even purport to consider the merits of those stated justifications. Instead, the majority rejected the plausible assumption that cable facilities serving separately owned buildings are more likely to resemble traditional cable systems, because it had "no basis for assuming this." *Id.* at 4a. The court dismissed other proposed justifications because "the FCC has wholly failed to flesh these out." *Ibid.* Refusing to rely on what it deemed "naked intuition" (*ibid.*), the majority therefore invalidated as irrational the "com-

[22] Respondents contend (Br. in Opp. 20-21) that the Commission's report on remand was in fact a rejection of the policy underlying Congress's classification and that this fact somehow affects the constitutionality of the Act. That contention, however, is irrelevant. Insofar as the constitutional issue is concerned, the Commission endorsed Chief Judge Mikva's rational-basis analysis, agreeing that the classification is "reasonable." Pet. App. 50a. Because the justifications suggested by the separate opinion were sufficient to sustain the statute, it is irrelevant that the Commission was unaware of any further justifications "beyond those suggested by Judge Mikva." *Ibid.* Contrary to respondents' suggestion, moreover, it makes no difference whether the classification at issue reflects the Commission's own policy preferences. As the court of appeals (Pet. App. 19a-25a) and the Commission (5 F.C.C. Rcd. at 7641; J.A. 20-22) recognized, the Cable Act is clear in establishing the "common ownership" requirement at issue here. We are aware of no decision holding a statute unconstitutional on the ground that an administrative agency has expressed a policy preference different from the one expressed in the plain language of the statute.

mon ownership" requirement in 47 U.S.C. 522 (6)(B) (1988). Pet. App. 4a, 6a.[23]

Based on that reasoning, it is evident that the majority was in fact asking the Commission to create an administrative record giving factual substantiation to what the majority was simply unwilling to assume. But under this Court's rational-basis decisions, "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the

[23] The court's initial decision had also raised the question of the Act's disparate treatment of SMATV facilities that interconnect separately owned buildings by wire (and are "cable systems") and those that use nonphysical transmission media to link such buildings (and are not "cable systems"). Pet. App. 34a-36a. And respondents attempt to argue that if Congress sought to protect consumers by regulating facilities with a larger subscriber base, "it makes no sense that Congress did not also seek to restrict the market size of locally unregulated 'wireless' operators." Br. in Opp. 16. Following remand, however, the court of appeals expressly declined to reach the validity of exempting wireless facilities while regulating facilities that interconnect separately owned buildings through physical transmission media (Pet. App. 3a), and that question is not presented here. Respondents' argument is, therefore, a thinly cloaked effort to raise an issue not properly before this Court. In any case, respondents err in contending that if Congress chooses to regulate some types of facilities with a large subscriber base, it must regulate them all. See *Flemming* v. *Nestor*, 363 U.S. at 612 ("[I]t is * * * constitutionally irrelevant that * * * the [statute] does not extend to all to whom the postulated rationale might in logic apply."); *United States* v. *Petrillo*, 332 U.S. 1, 8 (1947). In fact, there is a rational basis for exempting wireless technologies that has nothing to do with consumer protection; Congress may have been trying to provide a deregulatory incentive to switch to such technologies. See Pet. App. 42a (separate opinion of Mikva, C.J.).

light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within 'the knowledge and experience of the legislators." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938) (Stone, J.). By refusing to assume the existence of the plausible state of facts brought to its attention, the court of appeals failed to give sufficient weight to that presumption of validity. It also failed to heed this Court's admonition that courts are without authority "to reject the legislative judgment on the basis that wihout convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than * * * 'pure speculation.'" *Vance* v. *Bradley*, 440 U.S. at 111. In so doing, the court misapplied the settled law reflected in this Court's rational-basis decisions.

C. The Court Of Appeals' Rejection Of The Plausible Assumptions Supporting The Classification Cannot Be Squared With The Application Of The Rational-Basis Test By This Court

Given the plausibility of the justifications supporting the classification, the majority's insistence that legislative justifications be "flesh[ed] * * * out" on an administrative record and its refusal to "assum[e]" any facts that were not part of the record (Pet. App. 4a) cannot be squared with this Court's decisions applying the rational-basis test.

For example, in *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 108 (1949), this Court reviewed a municipal ordinance prohibiting the placement of advertisements upon trucks, except for "business notices upon business delivery vehicles * * * engaged in the usual business or regular work of the

owner and not used merely or mainly for advertising." The Court rejected an equal protection challenge alleging that the distinction between general advertisement and self-advertisement was "not justified by the aim and purpose" of reducing distractions. 336 U.S. at 109. In sustaining that classification, the Court reasoned:

> The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.

Id. at 110. In contrast with the majority's approach in this case, the Court's decision in *Railway Express* did not hesitate to make assumptions about "the nature [and] extent" (*ibid.*) of self-advertisements on vehicles, without a factual record supplied by the City. Nor did it have any administrative record to "flesh * * * out" (Pet. App. 4a) its assumptions about the dissimilarity of the two pertinent kinds of advertising. Rather, because it was able to conceive of plausible facts, the assumption of which justified the classification, the Court sustained the law.

Similarly, in *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), the Court upheld the rationality of an Oklahoma law that prohibited opticians from fitting or duplicating glasses without a prescription, but exempted sellers of "ready-to-wear" glasses. In rejecting the opticians' equal protection claim, the Court explained:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Id. at 489 (citations omitted). Applying those principles, the Court upheld the contested classification. *Ibid.* Contrary to the decision here, *Lee Optical* imputed rationality to the process of legislative line drawing when the evidence of record did not definitively foreclose the existence of plausible facts supporting it.

More recently, the Court in *Vance* v. *Bradley*, 440 U.S. 93 (1979), strongly reaffirmed that principle in rejecting an equal protection attack upon a statute requiring members of the Foreign Service to retire by the age of 60. In response to the plaintiffs' apparent contention that the classification could be sustained only upon submission of "empirical proof that health and energy tend to decline somewhat by age 60" (*id.* at 110), the Court responded:

> [T]his case, as equal protection cases recurringly do, involves a legislative classification contained in a statute. In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legis-

> lative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

Id. at 110-111. Finding the facts to be "arguable," the Court held that the legislative judgment reflected in the statute was "immun[e] from constitutional attack" under rationality review. *Id.* at 112.

The next year, in *United States R.R. Retirement Bd.* v. *Fritz*, *supra*, the Court upheld the Railroad Retirement Act of 1974, which prospectively eliminated a railroad retiree's ability to collect both social security and railroad retirement benefits. The case arose because the Act grandfathered dual benefits for those who had between 10 and 25 years of railroad employment, but only if the employee worked for a railroad in 1974 or had a "current connection" with a railroad as of the transitional date of the Act (December 31, 1974) or the date of his actual retirement thereafter. 449 U.S. at 166, 172-174. After reaffirming its general reluctance to invalidate a social or economic statute because it is "unwise or unartfully drawn" (*id.* at 175), this Court upheld the Act's "current connection" test on the ground that "Congress could assume that those who had a current connection with the railroad industry when the [Railroad Retirement] Act was passed in 1974, or who [had] returned to the industry before their retirement, were more likely than those who had left the industry prior to 1974 and who never returned, to be among the class of persons who pursue careers in the railroad industry, the class for whom the * * * Act was designed." *Id.* at 178. Because a plausible ground could be conceived for the challenged classification, the Court declined to overturn Congress's policy judgment

—even though those factual assumptions were neither explicitly stated nor empirically verified.

And last Term in *Burlington N. R.R.* v. *Ford*, *supra*, this Court upheld a Montana venue law pursuant to which a plaintiff may "sue a domestic company in just the one county where it has its principal place of business, while a plaintiff may sue a foreign corporation in any of the State's 56 counties." 112 S. Ct. at 2186. Burlington argued that the statute was unconstitutional as applied to a foreign corporation that "not only has its home office in some other state or country, but also has a place of business in Montana that would qualify as its 'principal place of business' if it were a Montana corporation." *Id.* at 2187. This Court rejected Burlington's claim, upholding the classification on the ground that

> Montana could reasonably have determined that a corporate defendant's home office is generally of greater significance to the corporation's convenience in litigation than its other offices; that foreign corporations are unlikely to have their principal offices in Montana; and that Montana's domestic corporations will probably keep headquarters within the State.

Ibid. With those assumptions in mind, the Court concluded that Montana may have found that the convenience to a defendant corporation outweighed the plaintiff's interest in forum selection only when the corporation was able to litigate "in the county containing its home office." *Ibid.* Of significance here, the Court did not require factual substantiation of its assumptions; rather, it noted merely that "[w]e cannot say, at least not on this record, that any of these assumptions is irrational." *Ibid.*

This Court's decisions in *Railway Express*, *Lee Optical*, *Vance*, *Fritz*, and *Burlington* reflect faithful applications of the well settled principle most recently reiterated in *Sullivan* v. *Stroop*—that a socio-economic classification does not violate equal protection principles "if any state of facts reasonably may be conceived to justify it." 496 U.S. at 485.[24] Those decisions, moreover, clearly instruct that, where socio-economic legislation is involved and the rational-basis standard applies, a reviewing court must indulge the democratic process by crediting plausible, but unverified, assumptions and by relying on common sense,

[24] For other decisions implicitly or explicitly applying that principle, see, *e.g.*, *Bowen* v. *Gilliard*, 483 U.S. 587, 599 (1987) (upholding statute reducing welfare payments for families receiving child support, based upon Congress's "assumption that child support payments * * * are generally beneficial to the entire family unit" and upon "the common sense proposition" that shared expenses reduce per capita cost of living with others); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 410 (1982) ("[T]he tolling provision is premised on a reasonable assumption that unrepresented foreign corporations, as a general rule, may not be so easy to find and serve."); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 315-316 (1976) (upholding law requiring police to retire at age 50, because "[t]here is no indication that [the statute] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute"); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961) (sustaining exemption of products from prohibition against Sunday sales because "a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day," and because the record "is barren of any indication that this apparently reasonable basis does not exist").

even when it is unsupported by legislative or administrative findings of fact. In contrast, the majority in this case never addressed the merits of the plausible, common sense justifications advanced in the separate opinion and endorsed by the FCC. Rather, the court simply refused (Pet. App. 4a) to "assum[e]" unverified facts or to credit any rationale that was not "flesh[ed] * * * out" in an administrative record. Under this Court's decisions, that refusal was error.

D. The Court Erred In Heavily Emphasizing Public Rights-of-Way As A Rationale For Local Franchising

The court of appeals' error in this case is attributable, in part, to its misplaced emphasis on the Commission's traditional reliance on use of public rights-of-way as a basis for subjecting cable facilities to local franchise requirements. See Pet. App. 34a-35a. Noting that that traditional rationale does not explain the distinction between facilities serving separately and commonly owned multiple unit dwellings, the court was "unable to imagine" any alternative basis for the rationale. *Id.* at 35a. The court's suggestion that a cable facility's use of public rights-of-way is the only imaginable basis for distinguishing between facilities properly subject to and immune from local regulation cannot be credited under this Court's cases.[25]

[25] The court of appeals also cites (Pet. App. 35a) passages from the Cable Act's legislative history suggesting that the premise of local jurisdiciton over cable facilities is the use of local streets and rights-of-way. However, the court of appeals held, and respondents do not contest in this Court, that the Cable Act in fact applies local franchising requirements to certain facilities that use no public rights-of-way. Pet. App.

It is true that a facility's use of public rights-of-way has been a crucial factor in allocating responsibility over cable to local governments. See, *e.g.*, *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804, 808-811 (D.C. Cir. 1984); *Cable Television Report & Order*, 36 F.C.C.2d 143, 207 (1972). However, it is one thing to say that the use of public rights-of-way is a legitimate justification for requiring local franchising of cable services, and quite another to conclude (as the court did here) that there is no other conceivable interest that will support the Cable Act's franchising distinctions. To insist upon the use of public rights-of-way as a constitutional prerequisite to franchising would be reminiscent of this Court's long-abandoned case law requiring that a business must somehow be "affected with a public interest" before it may be subjected to certain kinds of regulation. See, *e.g.*, *Tyson & Brother* v. *Banton*, 273 U.S. 418, 430 (1927) (striking down law regulating theater ticket prices); *Munn* v. *Illinois*, 94 U.S. 113, 130-132 (1877) (upholding regulation of grain elevator rates).

19a-25a. The fact that the legislative history does not explicitly state a rationale for such a franchising requirement does not justify invalidation of the statute on rational-basis grounds. See *United States R.R. Retirement Board* v. *Fritz*, 449 U.S. at 179 ("[T]his Court has never insisted that a legislature articulate its reasons for enacting a statute," particularly "where the legislature must necessarily engage in a process of line-drawing."); *Flemming* v. *Nestor*, 363 U.S. at 612 (finding it "constitutionally irrelevant" whether the rational reasons for a classification "in fact underlay the legislative decision"); see also *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history.").

That approach has been discarded as "an unsatisfactory test of the constitutionality of legislation directed at business practices or prices." *Nebbia* v. *New York*, 291 U.S. 502, 536 (1934). And the pertinent constitutional question—whether "an industry, for adequate reason, is subject to control for the public good" (*ibid.*)—is now to be answered by examining whether there are "plausible reasons for Congress' action" (*United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179) or whether "any state of facts reasonably may be conceived" to justify a law (*Sullivan* v. *Stroop*, 496 U.S. at 485). Under that standard, there is assuredly a constitutionally sufficient interest in assigning local authorities the power to engage in such measures as rate regulation, consumer protection, and the like (see, *e.g.*, 47 U.S.C. 543, 552 (1988)), without regard to whether a facility crosses public rights-of-way. And as we have shown —for reasons that have nothing to do with the use of public rights-of-way—there is a rational basis for distinguishing between the need for regulating facilities that serve separately, as opposed to commonly, owned multiple-unit dwellings. In short, the court of appeals' discussion of public rights-of-way is irrelevant to the validity of the classification at issue.[26]

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[26] In any case, pre-Cable Act precedent applied the "private cable" exemption without regard to the crossing of public rights-of-way. In a number of cases, the Commission declined to apply the "private cable" exemption, even though a facility was located wholly on private land and crossed no public rights-of-way. See, *e.g.*, *In re Citizens Dev. Corp.*, 52 F.C.C.2d 1135, 1137 (1975) (private community development); *In re Application of Bayhead Mobile Home Park*, 47 F.C.C.2d 763, 763-764 (1974) (requiring franchising of mobile home park located on private land). In addition, respondents err in rely-

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As Chief Judge Mikva observed: "The Cable Act is a large and complex piece of socioeconomic legislation, an effort to establish a comprehensive regulatory scheme for the cable industry, a product of public hearings, private negotiations, and compromise. SMATV operators, the [respondents] in this suit, participated actively in the process and, in fact, did quite well." Pet. App. 40a-41a. It is true that on the matter at issue here, respondents "lost a political battle in which [they] had a strong interest." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179. "[B]ut this is neither the first nor the last time that such a result will occur in the legislative forum" (*ibid.*), and "[t]he Constitution presumes that, absent some * * * antipathy [to the burdened parties], even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter

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ing (Br. in Opp. 7-10; Resp. Supp. Br. 2-3) on *In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983), aff'd *sub nom. New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984), to show that the crossing of public rights-of-way was determinative of the permissibility of local regulation of SMATV prior to the Cable Act. To be sure, the FCC in that docket preempted state and local regulation of SMATV facilities. 95 F.C.C.2d at 1235. The FCC, however, was careful to emphasize that "SMATV systems serving one or more multiple unit dwellings under common ownership, control, or management * * * are the subject of this proceeding," and that "SMATV systems which are defined as cable television systems by this Commission are not under scrutiny here." *Id.* at 1224 n.3. Accordingly, contrary to respondents' suggestion, *Earth Satellite* says nothing about the justifiability of imposing local franchising requirements upon cable facilities serving separately owned buildings without crossing public rights-of-way.

how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. at 97 (footnote omitted). Given the plausible justifications set forth by the dissenting judge in this case and seconded by the FCC, Congress's judgment about franchising facilities serving separately owned units was essentially "one of policy, and this kind of policy, under our constitutional system, ordinarily is to be 'fixed only by the people acting through their elected representatives.'" *Id.* at 102.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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